No. 2752

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMERY VALENTINE,
Plaintiff in Error,

vs.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of THE JUNEAU CONSTRUCTION COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Defendant in Error.

Brief of the Defendant in Error.

Three points are presented by the brief of the plaintiff in error, and they are as follows:

First: Error in admitting evidence and submitting to the jury the claim of 2½% for plans upon the Valentine Building;

Second: Alleged error of the Court in not refusing to allow 10% commission upon materials paid for directly by the plaintiff in error; and

Third: The allowance of interest from the 1st day of May, 1914, upon the judgment and verdict.

These various points will be discussed in the order above mentioned.

The plaintiff in error, defendant below, was the owner of certain real estate in the city of Juneau, and he entered into a contract with the defendant in error, plaintiff below, for the purpose of repairing and altering two of the buildings owned by him in the city of Juneau and for the further purpose of remodeling and practically building entirely anew another structure known as the Valentine

Building in the said city. The remodeling and the reconstruction of the Valentine Building was the largest job of the three; the other jobs were simply jobs of alteration and required no plans or architectural design with reference thereto.

The defendant in error employed one of the best architects in the city of Seattle, a Mr. Josenhaus, during this period of construction, and the defendant in error testified that it was definitely agreed in conversations with the plaintiff in error that 2½% should be allowed for the labor involved in drawing the plans for the remodeling of the Valentine Building (Tr. p. 26; Tr. p. 38).

The complaint alleged that the cost of lumber, materials, supplies and labor in the erection and remodeling of a certain building belonging to the defendant was $27,931.59 (Tr. p. 2). Upon the filing of the complaint the demand was made by the plaintiff in error for the filing of a bill of particulars. The present record is gotten up by the plaintiff in error as a short record, and the bill of particulars was omitted from the record. The defendant in error therefore suggests a diminution of the record, and has requested the clerk of the District Court for the First Judicial Division of Alaska to transmit to this court a certified copy of the first three pages of the bill of particulars, which has been transmitted, and under these circumstances we take it that the formal issuance of a writ of certiorari for diminution will not be necessary, but that an order may be entered which cannot be objected to by

either side, allowing the consideration of the certified copy of the bill of particulars.

At the bottom of page 2 of the certified copy of the bill of particulars is the charge $666.82 for the plans for the Valentine Block, so that when the case was tried and evidence introduced tending to show that the plaintiff in error had agreed with the defendant in error to pay 2½% additional for the plans on the Valentine Block, there could have been no element of surprise, and the allegations of the complaint as to the cost of remodeling the building together with the item in the bill of particulars clearly brought the allowance for the making of plans within the scope of the pleadings, and the Court properly admitted the evidence and submitted the issue to the jury.

The allegations of paragraph VI of the answer of the plaintiff in error show clearly that the issue as to the plans for the block was comprised in the pleadings and anticipated when the answer was drawn. Paragraph VI of the answer reads as follows:

> "Referring to the bill of particulars filed herein defendant alleges that he is not liable for the items $539.40 'plan for block' or for any sum whatsoever therefor, for that the defendant did not furnish any such plan, and is not entitled to any charge therefor."

It is apparent, therefore, that the evidence upon the question as to whether the defendant in error had agreed to pay 2½% for the plan was submitted

to the jury, and that the evidence was in conflict with the verdict of the jury, which was in favor of the defendant in error and thus settled this issue.

The second point raised by the plaintiff in error is that five bills for materials, to wit: American Paint Company, Alaska Electric Light and Power Company, Juneau Iron Works, Marshall and Newman and Juneau Telephone Company, were paid directly by the plaintiff in error and not through the defendant in error as a contractor, and therefore the 10% commission which was agreed upon as a proper commission for the builder should not have been computed on any of the items paid directly by the defendant in error.

The testimony of the defendant in error (Tr. p. 30) showed that he had a conversation with the plaintiff in error in May, 1913, in which the terms of the contract were stated. The conversation was had in the jewelry store of the plaintiff in error, and that among other things the plaintiff in error stated that he had agreed to pay 10% on the total cost of the building. This was denied by the plaintiff in error, and this question was submitted to the jury under proper instructions by the Court and the jury found against the plaintiff in error. It was a matter of disputed testimony, as appears from the record, and it is perfectly reasonable to assume that the theory of the defendant in error was perfectly correct, otherwise it would only be necessary to diminish the compensation of the contractor to an unreasonable minimum if the owner of the property saw fit to pay all of the bills directly instead of through the contractor. The statements of the

plaintiff in error with reference to the agreement are hardly believable, but, as we have said before, it was a matter of dispute in the testimony and was submitted to the jury, whose verdict was against the plaintiff in error.

The third point is that it is claimed that the Court erred in allowing interest under the verdict in its judgment. The verdict (Tr. p. 16) shows that the interest was allowed by the jury under a form submitted by the Court to the jury. There is no record showing any objection to the form of verdict at the time of its submission. There is nothing to show that the judgment was objected to upon the ground that the interest should not have been allowed. There is nothing to show that any of the questions discussed in the brief of plaintiff in error were presented in the motion for new trial. The motion for new trial is not in the record, and it must therefore be presumed that the questions which the plaintiff in error seeks to raise upon this appeal were not presented at the right time and in the proper form. The present suit was a suit brought to recover the commissions of the building contractor together with the disbursements made by the building contractor for the use and benefit of the plaintiff in error. It alleged that a certain amount had been expended and that there was due from the defendant in error to the plaintiff in error the sum of $5,000, with interest from the 1st day of April, 1914, and alleged failure and refusal of the plaintiff in error to pay the amount due and a demand upon the account. There is nothing in the record which shows the account was an open mutual account, simply an account for services and disbursements upon certain particu-

lar work described in the complaint upon which there had been credited certain payments made by the owner of the building, plaintiff in error. The balance due from the plaintiff in error to the defendant in error has been held back by the plaintiff in error since the 1st day of April, 1914. It will soon be three years, and we suggest that a careful examination of the record in the present case shows that the appeal is purely and simply for the purpose of delay, and that there is no color of merit to any of the three claims presented by the plaintiff in error, and that therefore the judgment of this case should be affirmed.

Respectfully submitted,
SHACKLEFORD & BAYLESS,
V. A. PAINE,
Attorneys for Defendant in Error.